# FINANCIAL REGULATION: 2007 Q3

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## *Introduction*

New financial legislation was relatively abundant in 2007 Q3 in comparison with the preceding period. First, the regulations implementing the new legal regime for takeover bids were promulgated. They implement and complete the provisions of the Law and spell out certain matters to ensure that takeover bids are conducted in a full legal framework and with adequate legal certainty.

Highly significant from the standpoint of corporate accounting is the reform and adaptation of corporate accounting legislation for the purpose of international harmonisation. This task of adjusting the legislation to the criteria of international financial reporting standards (IFRSs) was carried out within the legal framework of the accounting directives.

In the area of payment systems, the existing Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET) will shortly be replaced by TARGET2, which is characterised by a single technical platform and will be structured as a multiplicity of payment systems.

The ECB has partially amended the regulations for managing foreign reserve assets in anticipation of, among other things, the future entry of new States to the euro area.

In the area of financial institutions, the Community legislation on distance marketing of consumer financial services, which establishes a rigorous regime for the information that consumers must receive before conclusion of the contract, was fully transposed to Spanish law. In addition, various directives affecting financial institutions were amended to establish a series of procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector. Finally, the statistical reporting requirements have been extended to collective investment institutions to adapt them to the new information needs of the ECB.

In securities market legislation, a directive was published on the exercise of certain rights of shareholders in listed companies, in order to consolidate their rights, particularly proxy and electronic voting rights.

In regard to insurance, a law was passed to transpose in full the Community legislation on reinsurance and complete and systematise the current regulations on its supervision.

Finally, a law on the financing of political parties was enacted which establishes greater levels of transparency and public disclosure; and a law on competition was promulgated which strengthens the existing mechanisms for safeguarding effective market competition, taking into account the new Community legal system and the competence of regional (autonomous) governments.

## *Decree implementing the new regime for takeover bids*

On 13 April 2007 Law 6/2007 of 12 April 2007[1] reforming Law 24/1988 of 28 July 1988[2] on the securities market was enacted to modify the regime governing takeover bids and issuer transparency. Its purpose was twofold: first, to introduce the amendments required to trans-

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**1.** See "Financial Regulation: 2007 Q2", *Economic Bulletin*, July 2007, Banco de España, pp. 114-118. **2.** See "Regulación Financiera: tercer trimestre de 1988", *Boletín económica*, Banco de España, October 1988, pp. 61-62.

pose Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids and, second, to change certain legal provisions so as to ensure that takeover bids are conducted in a full legal framework and with adequate legal certainty.

Recently the regulations implementing Law 6/2007 were promulgated in *Royal Decree 1066/2007 of 27 July 2007* (BOE of 28 July 2007) on the regime governing takeover bids, which, in addition to addressing the aforementioned two objectives, implements and completes the amendments introduced by the Law. This Royal Decree repeals Royal Decree 1197/1991 of 26 July 1991 which regulated this subject-matter.

SCOPE OF APPLICATION

The Royal Decree will apply to all takeover bids, whether voluntary or mandatory, for a listed company. As required by Law 6/2007, provision is made for cases of cross-border application of the Royal Decree, and it is specified which aspects of the bid will be governed by Spanish law and which will governed by the legislation of the country where the company's registered office is located.

MANDATORY TAKEOVER BID

The Royal Decree stipulates that a mandatory takeover bid shall be made when control of a company is achieved, whether it be in a direct, or in an indirect or unexpected manner. Similarly to Law 6/2007, the Decree presumes that a natural or legal person (individually or in concert with others) controls a company when he holds, directly or indirectly, 30% or more of the voting rights; or when he has a smaller holding but designates in the 24 months after the holding acquisition date a number of directors which, taken together with any already designated, represent more than 50% of the company's Board members. In both cases the Law requires a takeover bid to be made for 100% of the shares[3] at an equitable price. In determining this price, the full amount of any consideration paid or agreed in each case by the offeree company or persons acting in concert therewith shall be included, for which purpose certain rules detailed in the Decree shall be applied.

The bid shall be submitted as soon as possible, at most within one month from when control was achieved, unless such control was achieved indirectly or unexpectedly (for example, through merger), in which case the submission deadline is three months from the merger date or from when control was taken.

However, the Decree establishes the cases in which the CNMV can conditionally dispense with the obligation to make a mandatory bid. Also specified are the cases in which the bid price can or must be adjusted upward or downward.

Apart from the above, provision is made for two additional cases of mandatory bids envisaged in the Law. First, bids for suspension of trading of shares on Spanish official secondary markets, which can only be made as purchases with the total price offered as money and in which the suspension of trading must be decided by the general meeting of shareholders. And second, bids for the reduction of capital through the purchase of treasury shares for cancellation, without prejudice to the minimum requirements of the consolidated text of the Public Limited Companies Law approved by Royal Legislative Decree 1564/1989 of 22 December 1989.

The Decree establishes that if the obligation to make a mandatory takeover bid is not complied with, the voting rights derived from any directly or indirectly held securities of the listed com-

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**3.** Under the previous law it was only required to make a bid for all of the capital when it was sought to acquire 50% or more of the capital of the offeree company or when it was sought to acquire less than 50% but certain circumstances applied.

pany may not be exercised unless the number of securities required to obviate that obligation is disposed of in the stipulated time period.

VOLUNTARY TAKEOVER BID

In the same terms as in Law 6/2007, the Decree provides for voluntary takeover bids in cases in which a person wishes to purchase a significant package of shares, addressing himself for this purpose to all shareholders. These bids can be made for all or part of the capital. In general, the same rules apply as in mandatory bids, with certain exceptions stated in the Decree, including that they are not subject to the equitable price requirement.

A voluntary bid may also be made for less than the total number of shares by a person who will not, as a result of the bid, reach a controlling stake or by a person who already has a controlling stake and can freely increase his holding in the offeree company without subjecting himself to the obligation to make a mandatory bid.

CONSIDERATION AND COLLATERAL OFFERED IN THE TAKEOVER BID

The consideration for the company's shares can be cash or securities or a mix of the two. Certain cases are addressed in which cash consideration must be offered as an alternative to ensure that the shareholders are adequately protected. To ensure the successful outcome of the takeover bid, the offeror must accredit before the CNMV that he has duly provided collateral evidencing that he can pay the consideration offered.

TAKEOVER BID PROCEDURE

The Decree minutely details the takeover bid process, which starts with the announcement of the intention (voluntary bid) or obligation (other cases) to submit a public bid. This announcement must be made as soon as it is decided to make a bid or when the circumstances requiring a mandatory bid arise. Once the announcement has been made, the authorisation application must be submitted to the CNMV together with the documentation needed for analysis. Once granted, the authorisation must be disseminated by the offeror in the *Boletín de Cotización de las Bolsas de Valores* (Stock Exchange Trading Bulletin) of the stock exchanges on which the shares are traded and on all of them if the shares are included in the Spanish computerized trading system (*Sistema de Interconexión Bursátil*) and in at least one national newspaper, in order to inform the market and, in particular, all the shareholders of the offeree company. Throughout all this process, the employees of the offeror and offeree company must be properly informed.

The Decree stipulates that the offeror has to allow the shareholders a certain amount of time to accept the bid, if they so wish. This time period, which shall be set by the offeror, must not be less than 15 or more than 70 calendar days, counting from the stock exchange working day following the date of publication of the first announcement, although in certain cases it can be extended. Before this time period ends, the board of directors of the offeree company has to publish a report setting out its opinion on the bid. Also, the board or management of the offeree company and offeror shall inform the representatives of their respective employees or, otherwise, the employees themselves, to whom they shall send a brochure explaining the bid when it is published.

Also set forth is the regime applicable to possible authorisations of government agencies other than the CNMV.

The Decree establishes certain limitations on the acts of the offeror during the procedure, such as abstaining from disseminating or making public by whatsoever means any information not included in the announcement prior to the bid. The offeror is also subject to restrictions on the exercise of the voting rights carried by the portion of his shareholding in excess of the threshold triggering the obligation to launch a bid, and on the acquisition of shares of the offeree

company during the procedure, although the Decree permits some leeway provided that it is not prejudicial to the shareholders.

The bid concludes with the takeover bid acceptance period, the calculation of acceptances received and the bid settlement.

DEFENSIVE MEASURES VIS-À-VIS TAKEOVER BIDS

As provided in Law 6/2007, the Decree stipulates that, from the public announcement of the bid until the bid outcome is made public, the offeree company's board and management, or any body delegated or empowered thereby, must obtain the prior authorisation of the general meeting of shareholders before taking any action, other than seeking alternative bids, which may result in the frustration of the bid and in particular before issuing any shares which may result in a lasting impediment to the offeror's acquiring control of the offeree company.

MODIFICATION, WITHDRAWAL AND SUSPENSION OF BID EFFECTS

Takeover bids shall be irrevocable from the public announcement and may not be modified, withdrawn or the effects thereof suspended, except as specified in the Decree. Thus the bid characteristics may be changed at any time prior to the last five calendar days of the time allowed for acceptance of the latter provided that such change entails a more favourable treatment for those to whom the bid is addressed, whether because it extends the initial bid to a larger number of securities, because it improves the consideration offered or because it removes or reduces the conditions, if any, to which the takeover bid is subject.

The offeror of a mandatory bid may withdraw it in certain cases, the main ones being as follows: a) when, for circumstances beyond the control of the offeror, the bid cannot be made or is clearly inviable, provided that the prior conformity of the CNMV is obtained; b) when the competition authorities declare the proposed transaction to be inadmissible or make their authorisation subject to compliance with certain conditions, and c) when, at the end of the procedure applicable to competing bids, there remains one bettering the terms of the mandatory bid. Similarly, in the case of voluntary bids, the offeror may also withdraw if he finds himself in circumstances similar to those of the mandatory bid, although with certain qualifications.

COMPETING BIDS

Competing bids are defined as those bids for securities that are launched when another bid for all or some of those securities has already been submitted to the CNMV and the time allowed for acceptance of the latter has not expired. A competing bid may not be made by persons acting in concert with the offeror of the current bid, belonging to the offeror's group or acting directly or indirectly on behalf of the offeror.

Nevertheless, the offeror may associate with or act in concert with third parties to improve his bid, subject to certain conditions, such as the requirement that no person or entity may participate directly or indirectly in more than one bid as co-offeror, in concert with the initial offeror or in any other capacity.

All competing bids shall be processed by order of submission and must meet certain requirements, including that they must better the preceding bid either by increasing the price or value of the consideration offered or by extending the bid to a larger number of securities.

RIGHT OF SQUEEZE-OUT

First introduced in the Spanish legal system in Law 6/2007, the right of squeeze-out refers to the case in which, following a bid for all of a company's securities, the offeror holds at least 90% of the capital and the bid has been accepted by the holders of securities representing at least 90% of voting rights. In this case, once the bid has been settled, the offeror can require the holders of the remaining securities to sell him their securities at a fair price and, similarly, the holders of remaining securities of the offeree company can require the offeror to buy their

securities from them at a fair price, which shall be equal to the consideration in the public bid. The right of squeeze-out must be exercised within a maximum of three months from the end of the time allowed for acceptance.

SUPERVISION, INSPECTION AND SANCTIONING REGIME

Finally, the Royal Decree concludes with a brief mention of the supervision, inspection and sanctioning regime applicable to the activities regulated by it. Notably, the persons or entities originating a takeover bid, the offeree companies, the securities firms and agencies or credit institutions acting in representation of the offeree, the directors of any of the aforementioned entities and any other person directly or indirectly intervening on behalf of or in concert with the former in the takeover bid shall be subject to the supervision, inspection and sanctioning regime established in Law 24/1988 of 28 June 1988 on the securities market.

The Royal Decree came into force on 13 August 2007.

***International harmonisation of Spanish accounting legislation in accordance with European law***

Law 19/1989 of 25 July 1989[4] partially reforming and adapting Spanish corporate law to European Economic Community directives in the corporate sphere, initiated the process of harmonisation of Spanish accounting rules to those of the European Union. To do this, the Commercial Code applicable to all employers was amended to include in it more precise corporate accounting rules than those previously in place.

This harmonisation process continued with the enactment of the consolidated text of the Public Limited Companies Law via Legislative Royal Decree 1564/1989 of 22 December 1989. The first stage of the process concluded with approval of the General Chart of Accounts in Royal Decree 1643/1990 of 20 December 1990, and of the Rules for Preparing Consolidated Financial Statements in Royal Decree 1815/1991 of 20 December 1991.

As part of the strategy of adoption of the international accounting standards set by Community institutions, a new legal framework was set in place. The main milestone within this process was the publication of Regulation 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (which include *International Accounting Standards* (IASs) in the strict sense, the current *International Financial Reporting Standards* (IFRSs) and the interpretations of both).

The most recent development is the enactment of *Law 16/2007 of 4 July 2007* (BOE of 5 July) on reform and adaptation of accounting-related corporate law for international harmonisation according to European Union law, which, on the basis of the legal framework established by the accounting directives, is seeking to align itself with IFRS criteria.

ANNUAL ACCOUNTS

Regarding annual accounts, in addition to the balance sheet, income statement and notes, two new documents are added: a statement of changes in equity and a cash flow statement. The latter will not be obligatory when the balance sheet and statement of changes in equity can be prepared in abridged form.

As under the previous law, the balance sheet shall present separately assets, liabilities and equity; and in the latter the classification shall at least distinguish own funds from other equity items. Similarly, the income statement shall present the profit or loss for the period, duly separating the revenue and expenses allocable thereto, and distinguishing operating results from those not deemed to be such.

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**4.** See "Regulación financiera: tercer trimestre de 1989", *Boletín Económico*, October 1989, Banco de España, p. 50.

The statement of changes in equity shall include a record of certain income items arising from changes in value derived from application of the fair value method, which, when the circumstances defined for this purpose are fulfilled, will reverse to the income statement. The statement of changes in equity shall be made up of two parts. The first shall consist of the profit or loss for the period (balance of the income statement) and the income and expenses that have to be taken directly to equity. The second shall include the changes in the firm's equity, including those arising from transactions with equity holders or owners acting in their capacity as such.

The cash flow statement shall present, duly ordered and grouped by category or type of activity, the firm's receipts and payments in order to inform of the cash movements in the period. Finally, the notes shall complete, amplify and comment on the information contained in the other documents forming part of the annual accounts.

The annual accounts shall present, in addition to the current-period figures for each item, those for the previous period. Also, the notes shall offer qualitative information on the prior period situation when it is of significance in presenting the firm fairly.

A major aspect of the present reform is that the Commercial Code includes definitions includes constituent elements of annual accounts: assets, liabilities equity, income and expenses. Noteworthy is the new concept of equity that will be generally applicable to the regulation of companies. It is defined as the residual interest in the assets of the company after deducting all its liabilities. It includes the funds contributed upon formation or subsequently by equity holders or owners which are not considered to be liabilities, plus retained earnings or other changes in equity. Also considered to be equity is the amount classified as such in accordance with the criteria for preparing annual accounts increased by the amount of uncalled capital and by the amount of unpaid face value and share premium recorded as a liability for accounting purposes.

MEASUREMENT CRITERIA

As regards measurement criteria, the scope of the principle of prudence in valuation is adjusted so as to make it mandatory to record only the profits obtained up to the end of the accounting period. However, account must be taken of all risks arising in the current or a previous period and due information provided on them in the notes, without prejudice to any reflection they may have in the other documents forming part of the annual accounts.

Assets shall be recorded at acquisition cost or production cost and liabilities at the value of the consideration received in exchange for incurring the debt plus interest payable; provisions shall be recorded at the present value of the best estimate of the amount needed to meet the obligation at the balance sheet date. Also, the Law expressly requires the elements of annual accounts to be valued in the functional currency, which is the currency of the economic environment in which the company operates. However, the annual accounts must continue to be prepared and filed in euro.

Apart from the new wording of the accounting principles, one of the basic features of the reform is the inclusion in the Commercial Code, for general application and together with the acquisition cost measurement rule, of the fair value measurement criterion contained in the international standards adopted, although for the time being its use is limited to certain financial instruments.

Regarding the obligation to prepare consolidated accounts and management report, the concept of the decision-making unit as being what determines the obligation to consolidate is replaced by that of whether a company directly or indirectly exercises, or can exercise, control

over others. The main new valuation-related development in consolidated accounts is the valuation of the assets acquired, of the liabilities assumed and of any provisions in the legally stipulated terms at their fair value.

GOODWILL

Special mention should be made of the new accounting treatment of goodwill, which under IFRSs is not amortised, but rather recorded at each period-end at cost less any impairment loss. Additionally, the limitation under the previous rules, whereby it was prohibited to distribute profits or reserves until the goodwill had been amortised, unless there were distributable reserves for the same amount, has been removed. However, a restriction on the distribution of profits related to this goodwill is introduced, in that a non-distributable reserve has to be systematically set aside for the amount of the potential amortisation that would have been recorded for this asset.

The Law will come into force on 1 January 2008 and will be applied to the accounting periods beginning thereafter.

***Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2)***

Guideline ECB/2001/3 of 26 April 2001 on the Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET) basically sets out the legal framework of the TARGET, which was subsequently amended on various occasions and finally consolidated in Guideline ECB/2005/16 of 30 December 2005. The current TARGET has a decentralised structure linking together national real-time gross settlement (RTGS) systems and the ECB Payment Mechanism (EPM).

To modernise and update the TARGET system, *European Central Bank Guideline ECB/2007/2 of 26 April 2007* (OJ of 8 September 2007) on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2) and *European Central Bank Decision ECB/2007/7 of 24 July 2007* (OJ of 8 September 2007) concerning the terms and conditions of TARGET2-ECB were published recently.

From 19 November 2007 onwards, TARGET will be replaced by TARGET2, characterised by a single technical platform called the *Single Shared Platform* (SSP), which, like its predecessor, will be legally structured as a multiplicity of payment systems.

Migration from the national RTGS systems to the SSP will take place in stages and Guideline ECB/2005/16 will therefore continue to apply to such systems until the relevant central banks have migrated to the SSP.

Each Eurosystem central bank shall operate its own TARGET2 component system. Thus the names of the TARGET2 component systems shall only include 'TARGET2' and the name or abbreviation of the relevant Eurosystem central bank or of the Member State of such Eurosystem central bank. Specifically, the ECB's TARGET2 component system shall be called TARGET2-ECB.

The new system will have three separate levels of governance for both the establishment and the operational phases of TARGET2: the Governing Council (level 1), Eurosystem central banks (level 2) and SSP-providing central banks (level 3).

The Governing Council shall be responsible for the direction, management and control of TARGET2 and for safeguarding its public function. The ESCB's Payment and Settlement Systems Committee (PSSC) shall assist the Governing Council as an advisory body in all matters relating to TARGET2.

The Eurosystem central banks shall be responsible for the tasks assigned to Level 2, within the general framework defined by the Governing Council. In addition to its advisory role, the PSSC shall conduct the execution of the tasks assigned to Level 2. The Eurosystem central banks may organise themselves through the conclusion of appropriate agreements. Within the context of such agreements, decision-making shall be based on a simple majority, and each Eurosystem central bank shall have one vote.

At level 3, the SSP-providing central banks shall conclude an agreement with the Eurosystem central banks governing the services to be provided by the former to the latter. Such agreement shall also include, where appropriate, the connected central banks.

Regarding the functioning of TARGET2, each participating NCB shall adopt arrangements implementing the *harmonised conditions for participation* in TARGET2 laid down in the legal provisions. These arrangements shall exclusively govern the relationship between the relevant participating NCB and its participants in respect of the processing of payments in the payments module.

The ECB shall adopt the terms and conditions of TARGET2-ECB implementing also the harmonised conditions, except that it shall only provide services to clearing and settlement organisations, including entities established outside the European Economic Area, provided that they are subject to oversight by a competent authority and their access to TARGET2-ECB has been approved by the Governing Council. The Governing Council shall determine the rules applicable to the financing of the SSP. Any surplus or deficit resulting from the functioning of the SSP shall be distributed among the participating NCBs in accordance with the key for subscription to the ECB's capital. The Governing Council shall determine a common cost methodology and pricing structure for core TARGET2 services.

The Governing Council shall specify the security policy and security requirements and controls for the SSP and, during the transition period, for the Home Account technical infrastructure.

Migration from the current TARGET systems to the SSP shall take effect on the following dates: 19 November 2007 for the central banks of Germany, Luxembourg, Austria and Slovenia; 18 February 2008 for the central banks of Spain, Belgium, the Netherlands, France, Ireland, Finland and Portugal; and 19 May 2008 for the ECB, Greece and Italy.

Any Eurosystem central bank that has not migrated to the SSP by 19 May 2008 as a result of unforeseen circumstances shall migrate by 15 September 2008.

***European Central Bank: amendment of legal provisions on the management of foreign reserve assets***

*Guideline ECB/2007/6 of the European Central Bank of 20 July 2007* (OJ of 28 July 2007), amending Guideline ECB/2006/28 of 21 December 2006 on the management of the foreign reserve assets of the ECB by the national central banks and the legal documentation for operations involving such assets, was promulgated.

The Guideline changes the definition of *European jurisdictions* in Guideline ECB/2006/28 to cater for the future entry of new Member States to the euro area and is applicable to the Member States that have adopted the euro in accordance with the Treaty, as well as Denmark, Sweden, Switzerland and the United Kingdom (England and Wales only).

Also, in over-the-counter derivatives operations involving the ECB's foreign reserve assets, the possibility is added of using interest rate swaps, provided that the exposure is secured by collateral.

The Guideline came into effect on 27 July 2007.

***Distance marketing of consumer financial services***

The background to the distance marketing legislation includes most notably Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, known as the *Directive on electronic commerce*, which was written into Spanish law via Law 34/2002 of 11 July 2002 on information society and electronic commerce services.

Subsequently, Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services was published. It was partially written into Spanish law via Law 34/2003 of 4 November 2003 on the amendment and adaptation to Community law of private insurance legislation.

Recently, *Law 22/2007 of 11 July 2007* (BOE of 12 July 2007) on the distance marketing of consumer financial services was published to complete the transposition to Spanish law of Directive 2002/65/EC.

PURPOSE AND SCOPE OF APPLICATION OF THE LAW

The essential purpose of this Law, which came into force on 12 October 2007, is to protect consumers, keeping in mind always their potential greater vulnerability to the marketing of financial services without a physical presence[5]. This entails setting in place a rigorous regime governing the information to be provided to the client before conclusion of the contract.

It establishes a highly detailed system of prior information to be applied to financial service contracts negotiated and concluded at a distance[6], without prejudice to the application of the general provisions on information society services and electronic commerce contained in Law 34/2002. Specifically, it shall apply to financial services provided under distance contracts by financial institutions, the management companies of collective investment institutions, pension funds and venture capital entities and any others providing financial services, as well as the branches in Spain of foreign institutions of the same nature. It shall also apply to other institutions providing financial services, provided they are offered through a permanent establishment located in Spain, and to service providers established in another Member State of the European Union or European Economic Area when the recipient of the services is located in Spain and the services provided fall within certain fields specified in the Law.

IMPERATIVE NATURE AND RIGHT OF WITHDRAWAL

The consumers of distance financial services may not waive the rights conferred on them by the Law. Such waiver is null and void, as are shams following the letter but not the spirit of this Law, according to the provisions of the Civil Code.

The Law regulates the right of withdrawal, whereby the consumer shall have a period of 14 calendar days to withdraw from the contract without penalty and without giving any reason. This period shall be 30 calendar days in distance contracts relating to life insurance.

However, given the nature of many financial services, this right cannot be exercised in certain cases, which are set out in the Law. In particular, it shall not apply to contracts for financial services whose price depends on fluctuations in the financial market outside the supplier's control, which may occur during the withdrawal period, including transactions relating to for-

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**5.** For the purpose of the Law, 'financial service' means any banking, credit, payment or investment services, private insurance operations, pension plans and the activity of insurance intermediation. **6.** A "distance contract" means any contract negotiated and concluded through the exclusive use of a means of distance communication without the simultaneous physical presence of the supplier and consumer, consisting of electronic, telephonic, fax or other similar means.

eign exchange, money market instruments, transferable securities, units in collective investment institutions, etc. Nor shall it apply to those services the contractual conditions of which require special legal certainty, as in the case, among others, of mortgage loans, certain insurance policies, contracts performed in full by the parties thereto, such as transfer orders and bills sent for collection.

When the consumer exercises his right of withdrawal, he may only be required to pay for the service actually provided by the supplier up to the time of withdrawal in accordance with the contract. The amount payable shall not exceed an amount which is in proportion to the extent of the service already provided in comparison with the full coverage of the contract, and shall not in any case be such that it could be construed as a penalty.

FURTHER PROTECTION

The Law provides further protection to consumers, such as when the price of distance financial services has been charged fraudulently or improperly using the number of a payment card. In the event of such fraudulent use, the card holder may request immediate cancellation of the charge, such that the related accounts of the supplier and card holder are duly debited and re-credited as promptly as possible.

Also, even where the tacit renewal of distance services and communications contracts is permitted, services may not be provided without a prior request from the consumer.

The Law ensures legal protection for consumers and promotes the use of out-of-court complaints when so required by the consumer. The burden of proof in respect of compliance with the supplier's obligations under this Law to inform the consumer and the consumer's consent to conclusion of the contract and, where appropriate, its performance, shall be borne by the supplier.

Finally, the Law establishes a sanctioning regime, harmonising that laid down in Law 34/2002 on information society services with the existing specific regimes for financial institutions.

***Procedural rules and evaluation criteria applicable in acquisitions and increase of holdings in the financial sector***

Various Community directives[7] regulated, among other things, the prudential control of situations in which a natural or legal person decides to acquire or increase a qualifying holding[8] in a credit institution, assurance, insurance or re-insurance undertaking or an investment firm (hereafter "financial institutions"). But this legal framework had so far provided neither detailed criteria for a prudential assessment of the proposed acquisition nor a procedure for their application. This is the reason for the publication of *Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007* (OJ of 21 September) amending the earlier directives as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector. This Directive aims to clarify these criteria and procedures, make them uniform in the three main financial areas and provide the necessary legal certainty, clarity and predictability with regard to the assessment process, as well as to the result thereof.

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**7.** Directive Council Directive 92/49/EEC of 18 June 1992 on the co-ordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive); Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance; Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments; Directive 2005/68/EC on reinsurance; and Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) **8.** Qualifying holding means means any direct or indirect holding in a firm which represents 10% or more of the capital or of the voting rights, or any other possibility of exercising a significant influence over the management of the firm in which that holding subsists. Account shall not be taken of voting rights or shares held as a result of providing the underwriting of financial instruments and/or placing of financial instruments,provided that those rights are, on the one hand, not exercised or otherwise used to intervene in the management of the issuer and, on the other, disposed of within one year of acquisition.

One of the basic aims of this Directive is to harmonise the procedure and the prudential assessments throughout the entire European Union, without the Member States laying down stricter rules than those contained in this Directive, since it is increasingly common for group structures to extend to various Member States.

Member States shall require any natural or legal person or such persons acting in concert (hereinafter referred to as the proposed acquirer), who have taken a decision either to acquire, directly or indirectly, a qualifying holding in an insurance undertaking or to further increase, directly or indirectly, such a qualifying holding in an insurance undertaking as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20%, 30% or 50% or so that the insurance undertaking would become its subsidiary (hereinafter referred to as the proposed acquisition), first to notify in writing the competent authorities of the insurance undertaking in which they are seeking to acquire or increase a qualifying holding, indicating the size of the intended holding and the relevant information detailed in the Directive.

The competent authorities shall have a maximum of 60 working days to carry out the assessment, which basically consists of appraising the suitability[9] of the proposed acquirer and the financial soundness of the proposed acquisition, in accordance with the criteria set in the Directive. This is done in order to ensure the sound and prudent management of the financial institution the acquisition of which is proposed, having regard to the likely influence of the proposed acquirer on that financial institution.

If the competent authorities, upon completion of the assessment, decide to oppose the proposed acquisition, they shall inform the proposed acquirer in writing and provide the reasons for that decision, without in any case exceeding the assessment period. Subject to national law, an appropriate statement of the reasons for the decision may be made accessible to the public at the request of the proposed acquirer. This shall not prevent a Member State from allowing the competent authority to make such disclosure in the absence of a request by the proposed acquirer.

Member States shall make publicly available a list specifying the information that is necessary to carry out the assessment and that must be provided to the competent authorities at the time of notification. The information required shall be proportionate and adapted to the nature of the proposed acquirer and the proposed acquisition.

The competent authorities should work in close co-operation with each other when assessing the suitability of a proposed acquirer that is a regulated entity authorised in another Member State or in another sector. In any event, the responsibility for the final decision regarding the prudential assessment remains with the competent authority responsible for the supervision of the entity in which the acquisition is proposed.

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 21 March 2009. They shall inform the Commission thereof.

***Exercise of certain rights by shareholders of listed companies***

Directive 2001/34/EC of the European Parliament and of the Council on the admission of securities to official stock exchange listings and on information to be published on those securities, addresses the information that issuers must provide to the market; however, it focuses

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**9.** To appraise suitability, the Directive establishes a number of criteria, including, among others, the reputation and financial solvency of the proposed acquirer and the experience of any person who will direct the business activity.

largely on shareholders' voting rights, especially, the process of entitlement to vote. Under Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, issuers must provide certain information and relevant documents to the general meetings, but this obligation is only applied in the issuer's home Member State.

In this setting, *Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007* (OJEU of 14 July 2007) on the exercise of certain rights of shareholders in listed companies was published, in order to strengthen their rights, especially through the extension of the rules on transparency, proxy voting rights, the possibility of participating in general meetings via electronic means and the exercise of cross-border voting rights.

Member States shall ensure that the companies issue the convocation of the general meeting through such media as may reasonably be relied upon for the effective dissemination of information to the public not later than on the 21st day before the day of the meeting. Member States may provide that, where the company offers the facility for shareholders to vote by electronic means accessible to all of them, the general meeting may decide that it shall issue the convocation of a general meeting which is not an annual general meeting at least with 14 days' notice.

Member States shall ensure that shareholders which hold a minimum stake of at least 5% of the share capital, acting individually or collectively, have: a) the right to put items on the agenda of the general meeting, provided that the latter are accompanied by a justification or a draft resolution to be adopted in the general meeting, and b) the right to table draft resolutions for items included or to be included on the agenda of a general meeting.

Similarly Member States shall permit companies to offer to their shareholders any form of participation in the general meeting by electronic means, notably any or all of the following forms of participation: real-time transmission, real-time two-way communication enabling shareholders to address the general meeting from a remote location, and a mechanism for casting votes, whether before or during the general meeting, without the need to appoint a proxy holder who is physically present.

The use of electronic means for the purpose of participating in the general meeting may be made subject only to such requirements and constraints as are necessary to ensure the identification of shareholders and the security of the electronic communication, and only to the extent that they are proportionate to achieving those objectives.

As for proxy voting, Member States shall permit shareholders to appoint a proxy holder by electronic means and companies to accept the notification of the appointment by electronic means, ensuring that every company offers to its shareholders at least one effective method of notification by electronic means.

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 3 August 2009 at the latest.

***Collective investment institutions: changes to statistical reporting requirements***

CNMV Circular 2/1998 of 27 July 1998, of the National Securities Market Commission, on statistical reporting requirements of CIIs in the euro area, established the requirements governing the statistical information that these institutions should send to the CNMV, so that it might be used by the ECB to monitor monetary policy in the euro area. Subsequently, it was

partially amended by CNMV Circular 1/2002 of 16 September 2002, to adapt the reporting formats to the new ECB reporting requirements[10].

Subsequently, the regulations implementing Collective Investment Institutions Law 35/2003, of 4 November 2003[11], enacted by Royal Decree 1309/2005 of 4 November 2005[12], empowered the CNMV to collect the additional information it considers necessary for the exercise of its powers.

In accordance with this arrangement, *CNMV Circular 1/2007 of 11 July 2007* (Official State Gazette of 26 July 2007) was published on European Union statistical reporting requirements of CIIs, which partially amends Circular 2/1998, to include the changes introduced by the regulations implementing Law 35/2003, and to broaden the information requirements for collecting data on the States which joined the European Union on 1 May 2004 and those that joined the Economic and Monetary Union on 1 January 2007.

One of the most important aspects of the Circular is that, following the elimination of the legal category of money market investment funds, CIIs whose investment policy or objective is of a monetary nature, as defined in the Circular, shall be deemed to be included together with credit institutions in the list of monetary financial institutions (MFIs) published by the ECB and, consequently, should fulfil the requirements of the ECB.

The Circular will come into force on 31 December 2007.

***Amendment of the Law on the Regulation and Supervision of Private Insurance as regards the supervision of reinsurance activities***

Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC, established a prudential supervision framework for reinsurance activities in the European Union. The Directive follows the approach of Community legislation adopted in respect of direct insurance by carrying out the basic harmonisation to ensure the mutual recognition of authorisations and prudential control systems, thereby making it possible to grant a single authorisation valid throughout the Community and apply the principle of supervision by the home Member State.

In order to transpose Directive 2005/68/EC to Spanish insurance law, *Law 13/2007 of 2 July 2007* (BOE of 3 July) has been enacted. This legislation amends the Consolidated Text of the Law on the Regulation and Supervision of Private Insurance, approved by Royal Legislative Decree 6/2004 of 29 October 2004, as regards the supervision of reinsurance activities. The transposition does not introduce substantial changes into Spanish reinsurance regulations, although it does complete and systematise the current regulations on the control of reinsurance.

The Law defines the institutions that can accept reinsurance operations, access to the activity of Spanish reinsurance undertakings, conditions for engaging in the activity, and the intervention and supervision of undertakings. In accordance with Directive 2005/68/EC, it is also extensive to the various types of so-called "captive" reinsurance undertakings, whose purpose is to provide reinsurance cover exclusively for the risks of the undertakings to which they belong.

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**10.** As provided for in Regulation (EC) No 2423/2001 of the European Central Bank of 22 November 2001. **11.** See "Financial Regulation: 2003 Q4", Economic Bulletin, January 2004, Banco de España, pp. 84-87. **12.** See "Financial Regulation: 2005 Q4", Economic Bulletin, January 2006, Banco de España, pp. 112-116.

Regulated separately is the activity in Spain of reinsurance undertakings whose registered offices are in other member countries of the European Economic Area, as is that of undertakings with registered offices in third countries. Certain articles relating to the activity of direct insurance undertakings are also amended, such as those referring to technical provisions and the guarantee fund.

Finally, the stipulations on the transfer of data between insurers and reinsurers introduced by Law 26/2006, on mediation, are incorporated into the Consolidated Text of the Law on the Regulation and Supervision of Private Insurance. It is also envisaged how the regulations will be applied to those reinsurance undertakings already authorised before the forthcoming entry into force of Law 13/2007 on 9 December 2007.

***Financing of political parties***

*Organic Law 8/2007 of 4 July 2007* (BOE of 5 July), repealing Organic Law 3/1987 of 2 July 1987, has been enacted on the financing of political parties. The Law establishes a mixed system that covers first, the funds drawn from public financing in proportion to representativeness, and further, those from private financing.

Audit and monitoring mechanisms are also established, providing for maximum levels of transparency and disclosure. There are likewise control measures that prevent any departure from established functions, establishing a sanctions regime for breaches of regulations.

From the financial standpoint, mention should be made of the transitory rule stipulating the obligation to report to the *Tribunal de Cuentas* (Spanish National Audit Office) and the Banco de España any such agreement reached with credit institutions regarding the conditions governing the debt they may have with such institutions as at the entry into force of the Law. These agreements shall be those accepted under the habitual business practices between contracting parties.

***Competition protection***

Antitrust Law 16/1989 of 17 July 1979 devised a system based on two specialised, national administrative bodies – the Competition Protection Court and Competition Protection Service – to combat restrictive competitive practices and to control economic concentrations. There have since been changes, some far-reaching, and several implementing regulations have been promulgated.

Recently, *Antitrust Law 15/2007 of 3 July 2007* (BOE of 4 July) was promulgated, repealing Law 16/1989. This legislation, which came into force on 1 September, aims to reinforce the mechanisms already in place, equipping them with specific instruments and with an institutional structure to protect effective competition in the markets, bearing in mind the new Community regulatory arrangements and the competencies of the Regional (Autonomous) Governments in this area.

One of the main features introduced by the Law is the creation at State level of a single institution, independent from the government. This institution, the *CNC (National Competition Commission)*, will encompass the current Competition Protection Court and Service, which will disappear. The CNC is the body entrusted with applying this Law, and with promoting and safeguarding continuing effective competition in all productive sectors and throughout the national territory. Its functions are to instruct, resolve and arbitrate, and it shall further act in a consultative capacity, promoting and harmonising the protection of competition in the markets. The Law specifies the arrangements for the appointment and termination of the management bodies of the CNC, aimed at en-

suring their independent decision-making and, at the same time, their accountability to society.

The rest of the Law is structured in several sections which respectively regulate the basic instruments of the regulation along with the regime applicable to restrictive practices, and the principles governing the control of concentrations and the monitoring system; institutional aspects; procedural issues; and, finally, the sanctioning regime.

11.10.2007